Supreme Court, U.S.
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No. 93-1203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TIOGA PINES LIVING CENTER, INC., COMMUNICARE OF INDIANA, INC., D/B/A AMERICAN VILLAGE RETIREMENT COMMUNITY, BLOOMINGTON CONVALESCENT CENTER, INC., MEADOW HEIGHTS NURSING CENTER, INC., D/B/A LINCOLN HILLS OF NEW ALBANY, *et al.*,
Petitioners,

v.

INDIANA STATE BOARD OF PUBLIC WELFARE, INDIANA DEPARTMENT OF PUBLIC WELFARE, AND SUZANNE MAGNANT, in her capacity as ADMINISTRATOR OF INDIANA DEPARTMENT OF PUBLIC WELFARE,
Respondents.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

BRIEF OF RESPONDENTS IN OPPOSITION

PAMELA CARTER
Attorney General of Indiana
GORDON E. WHITE, JR.
Deputy Attorney General
Office of Attorney General
219 State House
Indianapolis, IN 46204
(317) 232-6307

S. WILLIAM LIVINGSTON, JR.*
MARK H. LYNCH
ANNA P. ENGH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Respondents

*Counsel of Record

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Questions Presented

1. Did the Indiana Supreme Court properly reverse a judgment for retrospective damages, and enter judgment for respondents (defendants below), when petitioners (plaintiffs below) had failed to present evidence sufficient to meet their burden of proof?

2. (a) Whether this Court's decision in *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) precludes petitioners' reliance on 42 U.S.C. § 1983 in seeking to recover retrospective damages from State agencies and a State official acting in her official capacity for alleged violations of the Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A).

(b) If petitioners may seek retrospective damages under 42 U.S.C. § 1983, whether the holding in *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990) that the Boren Amendment is enforceable under 42 U.S.C. § 1983 should be overruled.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts

In 1980, in response to rapidly rising Medicaid expenditures, Congress adopted the Boren Amendment, which provides that Medicaid reimbursement rates need only be adequate "to meet the costs which must be incurred by

efficiently and economically operated facilities." 42 U.S.C. § 1396a(a)(13)(A); *see Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498, 506 (1990). The Boren Amendment represented a significant departure from prior law, which required reimbursement on a "reasonable cost-related" basis, and was intended to give states flexibility to devise reimbursement systems that would contain costs and encourage the efficient delivery of Medicaid services. *Wilder*, 496 U.S. at 506.

After enactment of the Boren Amendment, Indiana developed a new Medicaid reimbursement system for nursing home care. The system contained provisions which were intended to limit reimbursement of costs that were unnecessary or that were incurred due to inefficient or uneconomical operations. The new system was approved by the Health Care Financing Administration ("HCFA"), the federal agency responsible for supervising the Medicaid program, and became effective on April 1, 1983.

The reimbursement system proved to be a relatively generous one. The great majority of the nursing homes in Indiana were paid rates which reimbursed all of their budgeted allowable costs plus a bonus payment.[1/] Also, reimbursement rates in Indiana were high compared to other states. In 1989, the last year for which figures were available at the time this case was tried, Indiana's rates were the 14th highest in the nation. R.P. 8732. The system also allowed rapid growth in expenditures — reimbursement levels increased from $301 million in 1983 to $591 in 1990. R.P. 8732.

[1/] Record of Proceedings ("R.P.") 8554-63, 8648, 8658, 8668. A nursing home's "budgeted allowable costs" included the costs in its budget for an upcoming year, as adjusted by certain limitations which one of petitioners' expert witnesses conceded were not improperly restrictive. R.P. 8056.

B. Proceedings Below

The complaint in this case was filed on January 24, 1990 in a state court in Indiana. The complaint, as amended, rested largely on two assertions. First, petitioners asserted that the reimbursement system did not adequately take account of inflation from one year to the next. The alleged failure to account for inflation was said to result in rates that were inadequate under the Boren Amendment as well as under an Indiana statute which provided that Medicaid rates must be "reasonable and adequate to meet the costs that are incurred by efficiently and economically operated facilities." IC 12-1-7-17.6(b)(1990). Second, petitioners asserted that certain "reasonableness" limits in the system were invalid under Indiana administrative law because the State had not promulgated the limits in rules.[2/]

In early 1991, the State repealed the reimbursement rules that were the subject of the complaint and adopted new ones. This mooted petitioners' claim for prospective relief, and the only issue at trial was liability for retrospective damages allegedly incurred while the old reimbursement rules were in effect. Pet. C35.[3/]

On March 25, 1992, the trial court entered a judgment that the reimbursement system that was in effect up through March 31, 1991, was unlawful under state and federal law. The court ordered that damages of about $125 million be paid to the nursing homes. Pet. 4. The damages were measured

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[2/] An amended complaint added claims of alleged violations of procedural requirements of the Boren Amendment.

[3/] Petitioners also sued to enjoin the new rules, and obtained a preliminary injunction from the trial court, but that claim is not part of the judgment on which petitioners seek review.

by recalculating the reimbursement rates for the period from January 24, 1988, through March 31, 1991, with no inflation limit and with no "reasonableness" limits. Pet. D1-D5. The judgment was entirely retrospective. It applied only to the system in effect prior to April 1, 1991, and it included only an award of damages. Pet. C35.

The State appealed the judgment to the Indiana Supreme Court. The court received briefs totalling more than 400 pages, heard oral argument, and then issued a 28-page opinion which discussed in detail petitioners' two principal assertions — the supposed failure of the reimbursement system adequately to account for inflation and the supposed failure under State law to promulgate the "reasonableness" limits in rules. The court, in a unanimous decision, rejected these assertions, reversed the award of damages for alleged "under-reimbursement for the period January 24, 1988, through March 31, 1991," and directed that judgment be entered for the State. Pet. A24.

REASONS FOR DENYING THE WRIT

The decision below raises no question that warrants review by this Court. Moreover, in its present posture, this case presents no federal questions for this Court to review. Although the Boren Amendment is enforceable in actions for prospective relief under 42 U.S.C. § 1983, the judgment below involved only a claim for retrospective damages, and such a claim can be heard (if at all) only under state law and not under § 1983.

Petitioners' attempt to portray the Indiana Supreme Court as a rogue court that flouted the requirements of federal law and caved in to "local interests and prejudices" is both impertinent and wholly unsupported. The decision below was reached by a unanimous five-member court, the highest court

in Indiana, and faithfully followed applicable law. Petitioners' claim for damages was dismissed because petitioners failed to offer sufficient evidence to support it, not because of any misapplication of governing law.

I. THIS CASE DOES NOT PRESENT A FEDERAL QUESTION.

The underlying premise of petitioners' position is that the Indiana Supreme Court failed properly to apply the Boren Amendment. But in its present posture, this case does not present any issue under the Boren Amendment. Although this Court has held that the Boren Amendment is judicially enforceable under 42 U.S.C. § 1983, *see Wilder*, 496 U.S. at 523, the only suits permitted under § 1983 against state officials in their official capacity are suits for prospective relief, not suits for damages, and suits against state agencies are not permitted at all under § 1983. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66, 71 (1989).

Here two of the defendants are state agencies that are not amenable to suit under § 1983, and the third defendant is a state official sued in her official capacity who can only be the subject of prospective relief. The claim involved here is only for retrospective damages allegedly suffered prior to April 1, 1991.[4/] Pet. C35. The claim for damages cannot be pursued under § 1983, and thus there is no jurisdictional basis for

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[4/] Petitioners at one point attempted to characterize their claim as one for equitable relief and not damages, and they argued that § 1983 permits claims for equitable relief. But it is irrelevant under § 1983 whether a claim is characterized as an equitable one; the relevant question is whether the claim seeks retrospective monetary relief and, if it does (as it undeniably does in this case), it cannot be pursued under § 1983 against state agencies or state officials acting in their official capacity. *Will*, 491 U.S. at 71 n.10.

petitioners' attempt to enforce the Boren Amendment with respect to that claim.[5/]

The claim for retrospective damages could be heard and sustained (if at all) only under state law. Petitioners have not challenged the ruling by the Indiana Supreme Court that the damages claim could not be sustained under Indiana law, and there is no basis for this Court to review the judgment dismissing that state law claim.

II. THE INDIANA SUPREME COURT APPROPRIATELY DISPOSED OF PETITIONERS' FEDERAL PROCEDURAL CLAIM.

Petitioners' principal argument is that the Indiana Supreme Court did not address their assertion that the State violated a federal procedural requirement under the Boren Amendment to make "findings" concerning the adequacy of reimbursement rates. Petitioners also assert that the decision conflicts with this Court's decision in *Wilder* and with decisions of other federal courts.

The underlying premise of petitioners' assertion — that the Indiana Supreme Court failed to decide the procedural claim — is wrong as a matter of law. The judgment in favor of the State necessarily rests on a decision that the procedural claim was either irrelevant to the damages claim or

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[5/] If the Court were to rule, contrary to *Will*, that petitioners can seek damages under § 1983, the Court would have the opportunity to revisit the question whether the Boren Amendment is enforceable under § 1983. Respondents respectfully submit that *Wilder* was incorrectly decided, and they would request the Court to overrule *Wilder*. Among several reasons to overrule *Wilder*, the Court's decision in *Suter* v. *Artist* M, 112 S.Ct. 1360 (1992) raises serious doubt as to the viability of the rationale of the *Wilder* decision.

unsubstantiated.[6/] \ This Court reviews judgments, not opinions,[7/] and there is no requirement that an appellate court's opinion must discuss every issue, no matter how frivolous, that is raised in the briefs. The Indiana Supreme Court addressed in detail the major arguments presented by the State's appeal. It was well justified in not mentioning the procedural claims because it was obvious that those claims were entirely irrelevant to the damages judgment that was the only subject of the appeal. The award of damages could be sustained (if at all) only with evidence that the reimbursement rates actually were inadequate, not with evidence of technical procedural violations,[8/] and not under § 1983 which permits only claims for prospective relief.

There is also no conflict between the decision of the Indiana Supreme Court and the decision in *Wilder* or other federal cases cited in the petition. The Indiana Supreme Court's opinion does not mention the procedural claim and thus does not say anything about that subject that is inconsistent with anything said by a federal court. Moreover, the federal court decisions, including *Wilder*, cited by petitioners are entirely distinguishable from this case. Those cases all involved claims for prospective relief intended to cure alleged procedural violations, and did not seek to prove a damages claim solely on the basis of an alleged procedural

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[6/] Respondents argued both points to the Indiana Supreme Court, with references to the substantial record evidence showing that there had been full compliance with all procedural requirements of the Boren Amendment. *See* Brief of Appellants, Nov. 20, 1992, at 68-72.

[7/] *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610, 626 n. 11 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

[8/] *Cf. Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982).

violation.

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF FEDERAL COURTS OF APPEALS CONCERNING A SUBSTANTIVE BOREN AMENDMENT CLAIM.

Petitioners' other principal argument is that the Indiana Supreme Court did not apply "decisional rules" supposedly adopted by federal courts in evaluating the adequacy of Medicaid reimbursement rates.

The Indiana Supreme Court did not disagree with any decisions of the federal courts. It stated that judicial review of a Medicaid reimbursement plan "includes consideration of whether it complies with federal law." Pet. A7. It cited and relied on this Court's decision in *Wilder*, on decisions of the Seventh Circuit Court of Appeals, and on decisions of other federal courts in evaluating petitioners' claim. Petitioners lost the case because they had not submitted evidence sufficient to establish a claim that reimbursement rates were inadequate, not because of any misapplication of governing legal principles.

Petitioners' attempt to portray the Indiana Supreme Court as contemptuous of federal law and of the decisions of federal courts is misguided. Indeed, the very decision cited by petitioners to make their argument disproves it. In *Indiana Department of Public Welfare* v. *Payne*, 622 N.E.2d 461, 468 (Ind. 1993), the Indiana Supreme Court correctly stated that "lower federal court decisions may be persuasive" and that "[d]ecisions of the Seventh Circuit are entitled to our respectful consideration," but that only decisions of this Court are binding on state courts. *See* 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice*, ¶0.402[1] at I-21. The Indiana Supreme Court then cited and followed a decision of

the Seventh Circuit. The court in this case likewise relied on decisions of the Seventh Circuit. Pet. A7.

There is also no basis for the contention that the Indiana Supreme Court applied principles in deciding the substantive adequacy of Medicaid reimbursement rates that were in conflict with principles applied by federal courts. Pet. 18-24.

First, the application of a deferential standard of review was consistent with the weight of federal court authority. *See, e.g., Lett* v. *Magnant*, 965 F.2d 251, 257 (7th Cir. 1992); *Pinnacle Nursing Home* v. *Axelrod*, 928 F.2d 1306, 1312-13 (2d Cir. 1991). Moreover, the federal court decisions cited by petitioners are distinguishable from this case because they did not involve only a claim for damages. None of those decisions held that it is necessary to determine if there has been a procedural violation before applying a deferential standard of review when the only relief sought is for damages intended to compensate for alleged under-reimbursement which occurred in the past.

Second, the Indiana Supreme Court's placement of the burden of proof on petitioners was fully consistent with federal court decisions that a state's Medicaid reimbursement system is presumptively valid and that the plaintiff has the burden of showing that reimbursement is inadequate. *See, e.g., Lett*, 965 F.2d at 257; *Kansas Health Care Ass'n* v. *Kansas Dep't of Social and Rehabilitation Services*, 958 F.2d 1018, 1023 (10th Cir. 1992). The statement by the Indiana Supreme Court that petitioners had "to establish that there was no nexus between the costs of operating efficient and economical nursing facilities and the rates under the State's plan" (Pet. A8) was directly derived from federal decisions, not in conflict with them. *See Pinnacle*, 928 F.2d at 1314 (requiring that there be a "nexus" between the costs of operating efficient and economic facilities and the

reimbursement rates); *Illinois Health Care Ass'n* v. *Bradley*, 983 F.2d 1460, 1465 (7th Cir. 1993)(same).[9/] Nor did the Indiana Supreme Court require petitioners to meet an "impossible" burden of proof, or permit rates to be sustained if they were at "one-tenth of the reasonable costs of providing adequate care." Pet. 21-22. Of course, petitioners had to present evidence that the rates were not adequate to cover the costs "incurred by efficiently and economically operated facilities," as required by the Boren Amendment and by the Indiana statutory counterpart to the Boren Amendment. 42 U.S.C. § 1396a(a)(13)(A); IC 12-1-7-17.6(b)(1990). Petitioners did not present any evidence concerning the costs of efficient and economic operators, and thus their claim that rates were too low could not be sustained under either federal law or state law.

Third, there is no conflict between the Indiana Supreme Court and any federal statutes concerning quality of care. The court noted that the evidence submitted by petitioners that Indiana nursing homes had "difficulty meeting quality of care standards" consisted solely of testimony of a person who had not studied Indiana nursing homes. Pet. A19.[10/] There was no evidence that the rates were inadequate to meet the costs of efficient and economic providers to provide care in compliance with applicable laws and regulations concerning quality of care.

[9/] In their brief to the Indiana Supreme Court, petitioners themselves argued that there must be such a "nexus." *See* Brief of Appellees and Cross-Appellants, filed January 21, 1993, at 11, 32.

[10/] The testimony of the official at the state health agency who was responsible for monitoring compliance with health and safety regulations was that the quality of care provided by Indiana nursing homes was very good. R.P. 10367-69, 10401, 10417-18, 10420.

Fourth, there is no basis to the claim that the court failed to evaluate the overall adequacy of the Medicaid rates. There was no real dispute as to the adequacy of reimbursement provided by the system in 1983, when it was adopted and approved by HCFA. Petitioners' principal argument was that the system did not adequately adjust from one year to the next for changes due to inflation. Accordingly, the Indiana Supreme Court focused on the inflation adjustment component of the reimbursement system. Pet. A18-A21. Once the court had determined that the inflation adjustment was adequate, and that determination is unchallenged here, then the conclusion was inescapable that the system provided adequate reimbursement and that the claim for under-reimbursement must be dismissed.

In sum, there are no conflicts between the judgment below and federal "decisional rules."

CONCLUSION

Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

S. William Livingston, Jr.*
Mark H. Lynch
Anna P. Engh
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Pamela Carter
Attorney General of Indiana
Gordon E. White, Jr.
Deputy Attorney General
Office of Attorney General
219 State House
Indianapolis, IN 46204
(317) 232-6307

*Counsel of Record

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